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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/533,025	11/20/2006	Stephen Behr	20CF-144430	2195
69849 7590 12/15/2009 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP 990 Marsh Road Menlo Park, CA 94025				
EXAMINER				
MI, QIUWEN				
ART UNIT		PAPER NUMBER		
1655				
MAIL DATE		DELIVERY MODE		
12/15/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/533,025

**Applicant(s)**

BEHR ET AL.

**Examiner**

QIUWEN MI

**Art Unit**

1655

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 06 November 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 26 and 31-60 is/are pending in the application.
- 4a) Of the above claim(s) 34, 36-44, 59 and 60 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 26, 31-33, 35 and 45-58 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 4/26/05 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Applicant's amendment in the reply filed on 11/6/09 is acknowledged, with the cancellation of Claims 1-25, and 27-30. Claims 26, and 31-60 are pending. Claims 34, 36-44, 59, and 60 are withdrawn as they are directed toward a non-elected invention groups or species.

**Claims 26, 31-33, 35, and 45-58 are examined on the merits.**

Any rejection that is not reiterated is hereby withdrawn.

### **Restriction requirement**

Regarding withdrawn claims 59 and 60, at the time when the restriction to claims 47-53 were withdrawn, reference Kondo et al (JP 2000336024A) was not found. Now, with the newly found reference Kondo et al, the groups are not so linked as to form a single general concept under PCT Rule 13.1.; and therefore a lack of unity of invention exists. Since claims 47-53 have already been examined, the restriction requirement to claims 47-53 is moot. However, the newly added claims 59 and 60 are withdrawn; and, the requirement is deemed proper and is therefore made FINAL.

### **Claim Rejections –35 USC § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person

having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 26, 31-33, 35, and 45-58 are newly rejected under 35 U.S.C. 103(a) as being unpatentable over Kondo et al (JP 2000336024A) in view of Cyr (US 2004/0175439), and further in view of Cyr (US 2006/0228426).

This is a new rejection necessitated by the Applicant's amendment filed on 11/6/09.

Kondo et al teach cosmetic (dermatological) compositions containing one or more humectant plant extracts of *Chenopodium quinoa* etc for dry skin (see Abstract). Kondo et al teach a sample preparation of lotion (thus topical, administering to a subject) comprising purified water (physiologically acceptable carrier), polyethylene glycol 1000 (moisturizing agent), and Quinoa (the same as *Chenopodium quinoa*, see page 4, [0008]) in 20% EtOH extract (thus solvent extraction) (alcoholic solvent) (see full translation, page 27, [0085]). Kondo et al also teach that composition of cosmetics that contain moisture-retaining plant extracts with sustained moisture-retention effects over extended periods, and possess properties effective for skin treatments that prevent, alleviate, or improve such conditions as dryness, rough skin, cracks, chaps, dandruff, pruritus and inflammatory diseases (thus maintain and/or improve the health and/or appearance of the skin in a subject) (see page 32, [0100]). Kondo et al further teach Quinoa extract in 30% PG (propylene glycol, see page 24, [0074]) in test solutions (see page 26, Table 2). Kondo et al at last teach the plants used in this invention are described as follows, wherein the preparation is performed with the leaf, stem, root, flower, seed or whole plant, which may also come in the form of crude drugs (page 4, [0007]).

Kondo et al do not teach the plant material from *Chenopodium quinoa* has the matrix metalloprotease inhibiting activity; neither do Kondo et al explicitly teach using *Chenopodium quinoa* seed.

Cyr (US 2004/0175439) teaches plant extracts and compositions comprising extracellular protease inhibitors (see Title). As evidenced by Cys, *Chenopodium quinoa* has 66.3% MMP-1 inhibition (page 16, Table 1), 92% MMP-2 inhibition (page 20, Table 2 , and 23.1-34.7% MMP-9 inhibition (page 33, Table 4).

Cyr (US 2006/0228426) teaches *Chenopodium quinoa* inhibits the endothelial cell migration 90%, 85%, 53%, and 42% at concentrations 2.5X, 1.25X, 0.62X, and 0.31X, and the parts of *Chenopodium quinoa* used are leaf, seed, and stem (col 83, [0197]). Therefore, as evidenced by Cyr (US 2006/0228426), the seed extract of *Chenopodium quinoa* inhibits (attenuates) the endothelial cell migration.

It would have been *prima facie* obvious for one of ordinary skill in the art at the time the invention was made to use the extract of *Chenopodium quinoa* in a method of improving the appearance of skin, delaying the onset of aging, or delaying the dermatological condition such as inflammation since Kondo et al teach the plant extract with sustained moisture-retention effects over extended periods, and possess properties effective for skin treatments that prevent, alleviate, or improve such conditions as dryness, rough skin, cracks, chaps, dandruff, pruritus and inflammatory diseases. It would have been *prima facie* obvious for one of ordinary skill in the art at the time the invention was made to use a dermatological formulation comprising plant extract from *Chenopodium quinoa* that inhibit the activity metalloprotease since Cyr (US 2004/0175439) teaches *Chenopodium quinoa* has 66.3% MMP-1 inhibition activity, 92% MMP-

2 inhibition activity, and 23.1-34.7% MMP-9 inhibition activity. It would also have been *prima facie* obvious for one of ordinary skill in the art at the time the invention was made to use *Chenopodium quinoa* seed since Kondo et al at last teach the preparation of plants used in this invention is performed with the leaf, stem, root, flower, seed or whole plant. Choosing from a finite number of predictable solutions would have been obvious because a person of ordinary skill has good reason to pursue the known options with his or her technical grasps. If this leads to the anticipated success, it is likely that the product is not of innovation, but of ordinary skill and common sense.

Since the composition of Kondo et al yielded beneficial results in cosmetic industry, one of ordinary skill in the art would have been motivated to use the composition from Kondo et al.

From the teachings of the references, it is apparent that one of the ordinary skills in the art would have had a reasonable expectation of success in producing the claimed invention.

Thus, the invention as a whole is *prima facie* obvious over the references, especially in the absence of evidence to the contrary.

Applicant's arguments with respect to references Kondo et al and Cyr (2004/0175439) do not teach the new limitations in amended claim 26 have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Cyr (US 2006/0228426).

### **Conclusion**

No claim is allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Qiuwen Mi whose telephone number is 571-272-5984. The examiner can normally be reached on 8 to 5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

QM

/Michele Flood/

Primary Examiner, Art Unit 1655